IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 171 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
RASIKLAL H MAJITHIA - Defendant(s)

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Appearance :
MR AY KOGJE, AGP for Appellant(s) : 1,
MR MANOJ N POPAT for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 20/11/2006

ORAL JUDGMENT

1. The appellant-State has filed the present appeal being aggrieved by the judgment and decree dated 25th March, 1985 passed by the learned Extra Assistant Judge, Rajkot [at Gondal] in Civil

Regular Civil Appeal No. 17 of 1981, whereunder, while allowing the appeal, he had set aside the dismissal of the suit, recorded on 2.1.81 by learned Civil Judge [Senior Division], Gondal in Civil Suit No. 81 of 1976.

2. The short facts necessary for disposal of the present appeal are that the plaintiff was appointed as Sub Inspector and posted at S.R.P. Group-VIII at Gondal. Somewhere in the year 1973, promotion avenues opened, name of the petitioner was also referred, but on consideration of the totality of the circumstances, his name was rejected though juniors to him were promoted. Being aggrieved by the said action of the government, the plaintiff filed Regular Civil Suit No. 81 of 1976 on 6.4.76 in the court of the learned Civil Judge [Senior Division]. The defendant appeared before the court and submitted that as the criteria was merit-cum-seniority and as the plaintiff was less meritorious in comparison to others, he could not be promoted.

3. After recording the evidence and hearing the

parties, the trial court dismissed the suit, but on appeal, the same has been decreed therefore the State is before this Court.

4. Appeal has been admitted for hearing the parties on 8.9.86 on the following question of law:

> “Whether the criteria for promotion was seniority-cum-merit or merit-cum-seniority?”

5. In view of the pleadings raised by the respondent that the criteria was seniority-cum-merit, the question can straightaway be answered in favour of the respondent that the criteria was seniority-cum-merit and as the plaintiff was senior to many, his right could not be adversely affected taking shelter of the merits.

6. However, learned counsel for the State submits that the written statement contained a wrong statement that the criteria was seniority-cum-merit though in fact, the criteria was merit-cum-seniority. Referring to Rule-71 of the Bombay Police Manual, 1959, he submits that a

fair understanding of Rule-71 would make it clear that the criteria was merit-cum-seniority. On the other hand, Shri Manoj Popat, learned counsel for the respondent submits that Rule-71 would clearly speak contrary to the stand taken by the State and it would clearly appear that the criteria was seniority-cum-merit.

7. Rule-71 of the Bombay Police Manual, 1959 reads as under:-

"71. Principles governing appointments and promotion.__ The following principles should be observed in connection with the promotion of officers from a lower to a higher grade, service or post by selection:-

[a] No officer should be so promoted unless his record shows that he possesses the necessary positive qualifications for the higher grade, service or post such as personality, professional qualifications, initiative, strength of character and readiness to assume individual responsibility,

[b] No officer who has the positive

qualifications referred to in [a] above, should be passed over by an officer junior to him unless the latter has, in addition, really exceptional ability or qualifications and;

[c] In assessing merit of officers on comparative basis for the purpose of principles [a] and [b] above, the ability, energy, initiative, integrity, etc., of the officers concerned should be taken into consideration over a series of years wherever possible and the judgment should be formed after carefully considering reports of at least three different superior officers.

The above principles shall not apply in case of promotions to such key posts as the Heads of Departments, where Government's discretion is absolute.”

8. Clause[a] of Rule-71 provides that an officer should be promoted if he has certain positive qualifications for the higher grade, service or post such as personality, professional qualifications, initiative, strength of character and readiness to assume individual responsibility. It does not say that the people

falling within the zone of consideration would be comparatively considered on merits and the best out of the lot would be selected. Sub-clause [b] of Rule 71 in fact, gives a dent to the submission of the learned counsel for the appellant. Sub-clause[b] says that any person who is junior to the person referred to in clause[a] shall not be promoted unless in addition to the qualifications provided in sub-clause[a], he has exceptional ability or qualifications. In the present case, the State Government did not reject the case of the respondent-plaintiff on any ground available under Rule-71. It would support non-consideration on the ground that the plaintiff in the year 1972 was graded as “Fair”. The grading “Fair” would be something below “Good”, but still would not be negative quality. It is still positive quality, but something less than good quality. Rule 71[a] provides that one must have positive qualifications for higher grade, service or post such as personality, professional qualifications, initiative,

strength of character and readiness to assume individual responsibility. It is not the case of the State that the plaintiff was lacking in all of these qualities and the persons who were promoted had exceptional ability or qualifications to have a march in promotion over the present respondent.

9. I must hold that Rule 71 does not provide the criteria of merit-cum-seniority, but it simply provides the criteria of seniority-cum-merit. A person who is senior can be surpassed or superseded if the other person coming into the zone of consideration has exceptional ability or qualifications and not otherwise.

10. I must hold that the criteria was seniority-cum-merit and not merit-cum-seniority. The learned first appellate court was justified in decreeing the suit of the respondent.

11. The appeal deserves to and is accordingly dismissed. Interim relief, if any, stands vacated. No costs.

[R.S. GARG, J.]

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